No. 15118

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MILDRED REED WOOD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.
STATEMENT OF JURISDICTION.

This is an appeal from a judgment in favor of the United States of America rendered by the United States District Court on November 22, 1955.

The District Court accepted jurisdiction over this case by virtue of the provisions of the National Service Life Insurance Act of 1940, as amended (Title 38, U. S. C. A., Secs. 445, 551, 817).

This court has jurisdiction of the appeal under the provisions of Title 28, U. S. C., Sec. 1291.

II.
STATUTES INVOLVED.

The policy involved was issued under the provisions of the National Service Life Insurance Act of 1940, as amended (54 Stat. 1009). The Act may be found in Title 38, U. S. C. A., Secs. 801-823, inclusive.

III.
STATEMENT OF THE CASE.

Subsequent to the death of Lawrence C. Reed, appellant Mildred Reed Wood, sister of the decedent, caused a claim to be filed in writing with the Veterans Administration for death benefits as beneficiary under a National Service Life Insurance policy upon the life of Lawrence C. Reed.

The claim was disallowed by the Veterans Administration and the administrative decision was affirmed by the Board of Veterans Appeals on October 31, 1950.

Appellant filed her complaint on September 23, 1954, alleging a right to recover the proceeds of $10,000 upon the life insurance policy in question.

The appellee United States of America denied liability thereon and filed its answer, alleging that the said policy had lapsed for non-payment of premiums on February 1, 1948.

Trial was commenced on July 26, 1955 before the Honorable Jacob C. Weinberger, United States District Judge, and on November 22, 1955 the court rendered a judgment in favor of the United States of America.

Whereupon, the appellant prosecuted this appeal to this Honorable Court assigning certain errors.

IV.
STATEMENT OF THE FACTS.

On June 1, 1943, while Lawrence C. Reed was in active service in the United States Army, he applied for and was issued a five-year level term National Service Life Insurance Policy No. 10,815,106. The policy named the appellant, his sister Mildred Reed Wood, as beneficiary.

During his period of active service the premiums on the said policy were paid by a class "N" type allotment deducted from Lawrence C. Reed's active service pay through the period ending December 31, 1947.

Lawrence C. Reed was retired from the active service in the United States Army on December 31, 1947. The insurance premiums were discontinued on December 31, 1947 and the said policy lapsed for non-payment of premiums on February 1, 1948.

Upon retirement from the United States Army, Lawrence C. Reed received his full retirement pay each month, and no deductions from his retired pay were made for payments of the premiums on said insurance policy. No attempt was made to reinstate the policy or to pay the premiums to the Veterans Administration by direct remittance or otherwise. Lawrence C. Reed died on February 6, 1949.

Appellant assigns as error the judgment of the trial court as follows:

1. The court erred in refusing to enter a verdict for the relief prayed.

2. The court erred in adopting the conclusion that under no circumstances could the United States of America be found in effect to be estopped to protest the non-payment of premiums when the fault was due entirely to the negligence or error of the United States of America or its agents.

V.
ARGUMENT.

POINT I.

The Trial Court Did Not Err as the National Service Life Insurance Policy of the Decedent Was Not in Force Since the Policy Lapsed for Non-payment of Premiums.

Appellant Mildred Reed Wood, as beneficiary of the policy in issue has whatever rights that are available to one under the lapsed policy. As such, she can claim only the rights that the decedent may have had therein.

The court found that the decedent was retired from active service in the United States Army on December 31, 1947; that subsequent to his retirement from the Army he received his full retirement pay each month; that no deductions were made for payments of premiums on the insurance policy; and that Lawrence C. Reed died on February 6, 1949.

Army Regulation AR 35-5520 seems to indicate that a member of the Regular Army may, "if he desires," continue his Class N allotment for payment of premiums, and that "in such case no action is necessary on the part of the allotter." It seems to contemplate the execution of Form 141 if such an allotment is to be discontinued.

Though the foregoing may indicate that there was a failure of the Army to continue the deduction of insurance premiums from the retired pay of Lawrence C. Reed, it does not necessarily follow that the insurance premiums must be deemed to have been paid and that the insurance was in effect at the time of decedent's death. The responsibility for paying the premiums on the insurance is upon the insured. It was incumbent upon him

upon retiring from the service to take whatever action was necessary to keep the insurance policy in force. His allotment previously authorized to be made from his active service ceased when he commenced to receive retired pay.

Appellant argues that the notation heretofore referred to on DA-AGO Form 53-94 indicated an intention that the veteran was to "continue payment deducted from retirement pay" over the signature of the veteran and as such fully discharged his responsibility, so that no further action was necessary on his part.

It is well settled that where one retains the benefits to a transaction, he ratifies the transaction and is bound by it, and cannot avoid its obligations or effect by taking a position inconsistent with it. *Schumacher v. Harriett* (C. A. 4), 52 F. 2d 817; *1st Nat'l Bank v. Glens Falls, et al.* (C. A. 4), 27 F. 2d 64.

It is noted that the form also provided that the Army allotment, indicated in Col. 50 then in effect, was to be discontinued effective "31 Dec. 47." Thus, the decedent, by signing the form was put on notice that his allotment would be discontinued.

At the time of his retirement Lawrence C. Reed was employed as a civilian employee by the United States Army in the Canal Zone. He received the full retirement pay from the Army from January, 1948 until his death on February 6, 1949, a period in excess of one year. One is chargeable with knowledge of the law and when an individual voluntarily accepts benefits of a transaction, such acceptance is equivalent to consent to all the obligations arising from it, so far as the facts are known, or ought to have been known to the person accepting it.

12 Am. Jur. 517; *Cutting v. Bryan* (C. A. 9, 1929), 30 F. 2d 754, cert. den. 279 U. S. 860; *Shutte v. Thompson,* 82 U. S. 151.

One may waive any provision either of a contract or of a statute intended for his benefit. Thus, the estate of Lawrence C. Reed and the appellant is estopped to deny that the insurance lapsed for non-payment of premiums.

In the case of *Whiting v. United States* (C. A. D. C.), 122 F. 2d 196, the court applied this principle in a similar factual situation where a retired Army officer acquiesced in a Veterans Administration's ruling whereby he was paid disability benefits during his lifetime.

The case of *Riley v. United States* (D. C. W. Va.), 116 F. Supp. 155, affirmed on other grounds in 212 F. 2d 692 (C. A. 4), and *Joyner v. Ohio National Life Ins.* (C. A. 5), 118 F. 2d 1008, both involved circumstances indicating acquiescence in the action taken by the insurer as precluding a later contention that such action was erroneous. National Service Life Insurance (NSLI) is granted in consideration of premiums and the failure to pay any premium within the grace period causes the policy to lapse, unless the policy is otherwise kept in force under its terms. *Weiss v. United States* (C. A. 2), 187 F. 2d 610, cert. den. 342 U. S. 820, 72 S. Ct. 38, 96 L. Ed. 620; *Siller v. United States* (C. A. 5), 195 F. 2d 195; *Sawyer v. United States* (C. A. 6), 211 F. 2d 476.

The lapse of an NSLI policy is considered not to have occurred if an application for waiver of premiums is filed within the time required by statute and entitlement to waiver is established by the proof of continuous total disability of six or more months in duration during the period of time premiums were not paid. Title 38, U. S. C., Sec. 802(n); Title 38, C. F. R., Sec. 8.40.

This principle was illustrated in *United States v. Morrell* (C. A. 4, 1953), 204 F. 2d 490, cert. den. 346 U. S. 875, 98 S. Ct. 128, 98 L. Ed. 383, and *Kubala v. United States* (C. A. 5, 1954), 210 F. 2d 943.

It is noted that the case at hand is distinguishable for the reason that no waiver of premiums question is presented; and even waiver of premium cases have limitations requiring strict compliance with the statute in issue. The case of *Fox v. United States* (C. A. 5), 201 F. 2d 883, involved a serviceman who was a prisoner of war until September 12, 1945, he failed to file, by September 30, 1945, his claim for continuance of insurance and waiver of premiums on the ground of disability, the court held that the policy ceased and terminated as of the latter date under the NSLI Act.

National Service Life Insurance contracts, like the War Risk and United States Government Life Insurance contracts are not entered into by the Government for the purpose of gain. Therefore, the Government occupies a different position than the ordinary commercial or private insurance companies. Our courts have consistently held that the Government acts in such cases not in a proprietary capacity, but does so in its sovereign capacity. *James v. United States* (C. A. 4), 185 F. 2d 115; *McIndoe v. United States* (C. A. 9), 194 F. 2d 602; *McDaniel v. United States* (C. A. 5), 196 F. 2d 291; *United States v. Holley* (C. A. 5), 199 F. 2d 575.

Therefore, it is neither bound nor estopped by the acts or omissions of its officers or agents. *United States v. Loveland* (C. C. A. 3), 25 F. 2d 447; *Niewiadomski v. United States* (C. A. 6), 159 F. 2d 683, cert. den. 331 U. S. 850, 67 S. Ct. 1730, 91 L. Ed. 1859; *James v. United States* (C. A. 4), 185 F. 2d 115; *McIndoe v. United States* (C. A. 9), 194 F. 2d 602; *McDaniel v.*

United States (C. A. 5), 196 F. 2d 291; *Rodgers v. United States* (E. D. Pa.), 66 F. Supp. 663; *Lollos v. Vet. Admin.,* 105 F. Supp. 870 (D. N. J.), aff'd (C. A. 3), 202 F. 2d 153; *Karas v. United States,* 118 F. Supp. 446 (M. D. Pa.), aff'd (C. A. 3), 214 F. 2d 130; *Morris v. United States* (E. D. N. C.), 122 F. Supp. 155.

The courts have held that funds of an insured in the hands of the Government because of the Government's non-insurance activities may not be applied to prevent lapse of an NSLI policy. In *United States v. Griffin* (C. A. 8), 216 F. 2d 217, cert. den. 348 U. S. 927, 75 S. Ct. 339, 99 L. Ed. 245, the court held that accrued service pay was not available to pay premiums of an NSLI policy. In *Mikell v. United States* (C. A. 4), 64 F. 2d 301, the court held that money due the insurer by the Government for difference in pay on account of a promotion was not applicable to pay premiums on the insured's converted war risk policies, so as to extend the life of the policy beyond insured's death.

The court further stated that the rule compelling a private insurer to apply moneys payable to an insured toward the payment of premiums to avoid forfeiture was held inapplicable to the Government, except possibly with respect to moneys due under insurance policies. In this *Reed* case it is noted that not only were the funds not arising under insurance policies but that such funds due the decedent were paid in full to him and accepted by him for over a year after the lapse of the policy.

In the case of *United States v. Smith* (C. C. A. 9), 67 F. 2d 412, this court was unanimously affirmed by the Supreme Court of the United States in its opinion rendered in the case of *Smith v. United States* (1934), 292 U. S. 337, 54 S. Ct. 721, 78 L. Ed. 1295.

The *Smith* case concerned a naval seaman who, in his first enlistment, applied for and obtained a policy of War Risk insurance. He executed an application for authorization for deductions of insurance premiums from his service pay. He held a certificate of continuous service, and his authorization was never formally revoked. There was sufficient money due him at the end of each month to meet the premium payments, but deductions for premiums were made only for the period of his first enlistment.

This court held that he accepted all his pay due him and made no effort to pay the premiums.

The Supreme Court stated at page 341:

> "We are of the opinion there is enough to show abandonment of the contract by the assured and upon that ground the Circuit Court of Appeals should be affirmed.
>
> "After expiration of the first enlistment, neither party to the contract appears to have treated as operative the authorization for deductions contained in the application. Zimmerman accepted every month during a considerable period the full amount due him; made no effort to provide for payment of premiums when he must have been aware that no deductions had been made. There is nothing to indicate that he did not have full possession of his faculties or lacked intelligence or probity, or that he was unaware of the circumstances. If he had supposed the insurance remained in effect, common honesty would have moved him to provide for actual payment of the premiums. He must have known they had not been met. In the circumstances his conduct, we think, adequately indicates the exercise of his right to abandon the policy. See *Sawyer v.*

United States, 10 F. 2d 416; *United States v. Barry,* 67 F. 2d 763; *contra, Unger v. United States,* 65 F. 2d 946."

Unger v. United States (C. A. 10), 65 F. 2d 946, is distinguishable from the instant case in that the decedent made specific application to have deductions from his pay applied to War Risk Insurance. Furthermore, the question of waiver of premiums due to total disability of the decedent served to prevent the lapse of the policy. See *United States v. Ellis* (C. A. 5), 67 F. 2d 765.

The case of *Bouvier v. United States* (C. A. 9), 214 F. 2d 329, is distinguishable from the instant case because in *Bouvier* premium payments were actually made by the insured. Here, the decedent wilfully accepted his full Army retirement pay, he never tendered any premium payment to the Veterans Administration after his retirement.

Thus, there is no forfeiture involved, indeed, one may find that Lawrence C. Reed upon his retirement and lapse of the NSLI policy would consider that prospectively it was a wise thing to allow the lapse of the policy. The appellant ought now be allowed to complain under the circumstances.

The case of *United States v. LePage* (C. C. A. 1), 59 F. 2d 165, cited by the appellant ought not be considered as authority in this case for appellant's position for the decedent was in combat and he died from wounds received in combat during World War I. Congress provided gratuitous insurance for those in combat during World War II, however, the provisions limited benefits to a certain enumerated class of beneficiaries which if applied herein would not include the appellant. Title 38, U. S. C., Sec. 802(d).

It is noted that both the Veterans Administration and the Board of Veterans Appeals disallowed appellant's claim for benefits under the policy in issue. It is generally held that the established administrative construction is entitled to great weight and will not be overturned unless clearly wrong or a different construction is plainly required. *United States v. Citizens Loan & Trust Co.,* 316 U. S. 209, 214, 62 S. Ct. 1026, 86 L. Ed. 1387; *United States v. Madigan,* 300 U. S. 500, 505, 57 S. Ct. 566, 81 L. Ed. 767; *Boyett v. United States* (C. A. 5), 86 F. 2d 66.

POINT II.

The Trial Court Did Not Err in Its Decision in Refusing to Estop the Government to Deny the Non-payment of Premiums.

Appellant also bases her right to recover upon the alleged negligence or error of the United States of America or its agents. However, contractual liability of the United States cannot be grounded upon a negligent act, an unauthorized act or error of the United States or its agents. See *Federal Crop Insurance Corp. v. Merrill,* 332 U. S. 380, 92 L. Ed. 10; *Wilbur Nat'l Bank v. United States,* 294 U. S. 120, 79 L. Ed. 798; *Niewadomski v. United States* (C. C. A. 6), 159 F. 2d 683; *United States v. Norton* (C. C. A. 5), 77 F. 2d 731.

The United States is not amenable to suit unless it has consented to be sued. It has subjected itself to liability in damages for the wrongful acts or omissions of its agents or servants only to the extent authorized in the Federal Tort Claims Act. Since this is not a suit under the provisions of the Tort Claims Act, no recovery can be had on this theory.

The appellant in her second assignment of error has assumed that "the fault was entirely due to the negligence or error of the United States of America or its agents." It is submitted that this is an incorrect assumption for the deceased was the party in error and as in the case of *Smith v. United States, supra,* he should be deemed to have abandoned his insurance contract.

This point has been previously referred to under the previous argument. Your attention is respectfully directed to appellee's argument in answer to point one and that such be made applicable also to point two.

Conclusion.

The trial court did not err in granting judgment to the Government. There was no error of law in the rulings of the District Court. Therefore, the judgment should be affirmed.

Respectfully submitted,

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